

Lord Goddard in *Tims v. John Lewis & Co.*⁽¹⁾
Lord Goddard said this:—

"The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively as has been suggested. It is a question which objectively the court has to decide on the evidence before it."

The learned judge found that the statement made by Zakaria to corporal Jalal as neither a credible information nor did it give rise to reasonable suspicion as against the respondent within the meaning of the words in section 23(i) (a) of the Criminal Procedure Code.

It would appear that that finding of fact was based on the assumption that Zakaria broke down in the course of a prolonged interrogation and implicated the respondent. He came to the conclusion that the interrogation lasted 3 hours that is from 6.30 p.m. to 9.30 p.m. because (a) the corporal Jalal, admitted that he started questioning Zakaria at 6.30 p.m. after which he went to arrest the respondent and (b) that the time he left the police station was recorded in the station diary (not exhibited) as 9.30 p.m. The learned judge has discredited the corporal's evidence that he interrogated Zakaria between 6.30 p.m. and 7.30 p.m. because the statement, Exh. D.9 of Zakaria shows that it was recorded at 8 p.m.

In view of the fact that the corporal was giving evidence of an incident which happened a year previously I think the discrepancy as to time should not have been taken seriously. Even if the record was correct the interrogation must have been completed before the corporal started to type the statement at 8 p.m. In this case the corporal was not merely taking down a police report but a statement of Zakaria in the course of investigation and he would have to question the witness and ascertain all the facts before starting to record it. In any event the evidence shows that the corporal left the police station three hours after he started to question Zakaria but not that he questioned him for three hours. There is evidence to the effect that the corporal was waiting for the return of the police Land Rover and that fact might account for his leaving the police station three hours after 6.30 p.m.

Assuming that Zakaria had been questioned for three hours, and had as a result broken down and confessed implicating the respondent as well, the question is not whether the means employed to extract the information is right or wrong but whether his suspicion was reasonable judging from the facts he had before him. The judge has found that the means employed was persuasion which is a most commendable way of obtaining information. It is not suggested that the corporal persuaded Zakaria to implicate respondent but only that he persuaded him to tell the truth. If the corporal had persuaded Zakaria to implicate the respondent then he must have had information from somewhere else that the res-

pondent was involved, in which case, he need not have persuaded Zakaria to implicate him for the purpose.

In my view, there was a reasonable suspicion that the respondent was concerned in a seizable offence, and therefore the appeal should be allowed and the judgment of the learned judge set aside. The respondent will pay the costs here and in the court below.

Ismail Khan J. concurred.

MacIntyre J.: I have had the advantage of reading the judgment of the learned Chief Justice in the abovenamed appeal, and I am in entire agreement with it.

Appeal allowed.

MOTILAL v. GUTHRIE AGENCY (M) LTD.

[O.C.J. (Gill J.) December 19, 1967]
[K.L.—Civil Suit No. 1151 of 1964]

Master and Servant — Summary dismissal — Justification of.

The plaintiff sued for damages for his dismissal without notice by the defendants by whom he was employed as chief clerk on a rubber estate at Labis. The substantial issue in this case was whether the defendants were justified in summarily dismissing the plaintiff from his service.

The defendants in their defence alleged the following acts of misconduct by the plaintiff: (a) failing to maintain a proper record of telephone calls made on the account of Bertam Estate as at April 1, 1964; (b) attempting to persuade one Simon to destroy the record of telephone calls which he (Simon) maintained with effect from the 1st day of April 1964 as instructed by the manager of Bertam Estate; (c) failing to draw the attention of the acting manager of Bertam Estate to the fact that the shopkeeper on Bertam Estate — Durian Tunggal Division — had failed to pay the shop rent for the months of June and July 1961; (d) directing the shopkeeper aforesaid to credit his personal account with the sum of \$150 which represented the shop rent for the months of June and July 1961, taking advantage of such credit and failing to reimburse the estate with that amount; (e) failing to draw the attention of the manager of Bertam Estate to the fact that the shopkeeper aforesaid did not pay the rent for the month of October 1962; (f) directing the shopkeeper aforesaid to credit his personal account with the sum of \$50 which represented the shop rent for the month of October 1962, taking advantage of such credit and failing to reimburse the estate with that amount; (g) removing from Bertam Estate and being in possession of a copy of a document intitled "Special Report by R.P.S. Clay" which was at all material times the property of the said estate.

The plaintiff denied each of the alleged acts of misconduct.

Held: (1) allegations (a), (b), (c) and (e) by themselves did not constitute sufficient ground for summary dismissal;

(2) on the facts the defendants have proved allegations (d) and (f) beyond reasonable doubt, therefore the defendants were justified in summarily dismissing the plaintiff;

(3) the report in allegation (g) came to the estate while the plaintiff was still its chief clerk. He did not

do anything wrong in making a copy of it, unless he did so with the intention of publishing it;

(4) because of his summary dismissal the plaintiff was not entitled to any damages for wrongful dismissal. *Cases referred to:—*

- (1) *Sinclair v. Neighbour* [1967] 2 W.L.R. 1.
- (2) *Hayward & Anor. v. Pullinger & Partners Ltd.* [1950] 1 All E.R. 581.

CIVIL SUIT.

P. G. Lim (Miss) for the plaintiff.

R. H. V. Rintoul (Mrs. *S. B. Menon* with him) for the defendants.

Cur. Adv. Vult.

Gill J.: This is an action by the plaintiff for damages for his dismissal without notice by the defendants by whom he was employed as chief clerk on Melville Estate at Labis in the State of Johore. The trial of the action took seven days and a mass of evidence has been recorded, although much of this evidence is repetitious by reason of the lengthy cross-examination of witnesses, but the issues are fairly simple. Indeed there is but one issue, namely, whether the defendants were justified in summarily dismissing the plaintiff from their service.

The plaintiff was first employed by the defendants as a clerk at Yong Peng Estate in March 1952. In November 1953 he was made senior conductor on Bukit Asahan Estate from where he was transferred to Bertam Estate as clerk conductor in April 1954. In June 1960 he was made chief clerk of Bertam Estate from where he was transferred to Melville Estate as chief clerk with effect from 20th April, 1964. His dismissal took place on 27th August, 1964. One Sterling John de Courcy Williams was the acting manager of Bertam Estate from November 1960 to May 1961 when he went on leave and one Karel Edward August Richert took over from him. On his return from leave in November, 1961 Mr. de Courcy Williams became manager of the estate and Mr. Richert went back to Yong Peng Estate. He remained as manager of Bertam Estate until 21st August, 1963 when one P. G. Hughes took over from him. As from 1st April, 1964 Mr. Hughes was transferred to Yong Peng Estate as senior assistant manager in place of one Patrick Sharkey who became acting manager of Bertam Estate with effect from the same date. Thus the plaintiff served as chief clerk of Bertam Estate from November 1960 to 19th April, 1964 under four different managers or acting managers.

The plaintiff's evidence relating to the events leading up to his dismissal is as follows. In or about February 1964 Mr. Hughes, the then manager of Bertam Estate, sent him to the defendants' head office at Kuala Lumpur to help audit the accounts of the estate for the year ending 31st December, 1963, which he as chief

A clerk of the estate had prepared from the figures given to him by the manager and from the account books of all four divisions of the estate. His instructions were that he was not to answer any queries and to say that they should be directed to the manager. On his arrival at the head office the defendants' auditor, Mr. R. P. S. Clay, started questioning him on the accounts. On his refusal to answer any queries as instructed by his manager, Mr. Clay took him to the defendants' chief accountant, Mr. R. Austen, who, having been told what he had said to Mr. Clay, said to him, "I as secretary of this company have power to sack even the manager. So you do not worry. You are here to assist us in clearing the mess on the estate. If you will tell us the facts, I will see that you are all right."

B Having understood Mr. Austen to say that his position would be safeguarded if he answered questions but that he might be "sacked" if he refused, he thought things over and followed the instructions of Mr. Austen to answer whatever queries were put to him by Mr. Clay. He stayed in Kuala Lumpur for about a week and helped to clear up the accounts by telling Mr. Clay whatever he knew. He was then asked to take all the account books back to the estate and redraft the accounts. He therefore prepared the accounts again and sent them back to Kuala Lumpur. The audited accounts were sent back to the estate early in March 1964 together with a special report by Mr. R. P. S. Clay attached to the balance sheet.

C Before he saw Mr. Clay's special report Mr. Hughes told him that he was to go on transfer to Melville estate with immediate effect. This made him very suspicious, and he thought that his transfer might be a preliminary step to his dismissal because he knew of a case on another estate where the chief clerk was sacked because he had assisted the auditor. Another reason for his being apprehensive as to what might happen to him after his transfer to Melville estate was that one J. Bayne, a planting adviser to the estate at the time, had visited the estate after the audit and showed clear annoyance. Mr. Bayne had called him into his office when he was in Kuala Lumpur for the audit and suggested to him that he should change his replies to the queries put to him by Mr. Clay, which suggestion he had refused to follow because he had said that he could not change the facts. He thought that for that reason Mr. Bayne was angry with him, and because visiting agents and planting advisers have a lot of power over managers he felt insecure about his job. Mr. Hughes also appeared to be angry with him and did not talk to him. Mr. Sharkey who succeeded Mr. Hughes was hostile to him and probably suspicious of him because he got the auditor back on the estate on 17th April, 1964 to audit the accounts and vouchers which he had kept from 1st January

to the time of his departure from Bertam estate on transfer to Melville estate on 20th April, 1964.

He worked in Melville estate until 26th August, 1964. That evening when he was about to leave the office the manager called him and told him that a telephone call had been received requiring him to go and see one Mr. Stemson at the head office at 2 p.m. on the next day. When he arrived at the office at 2 p.m. on 27th August, 1964 as directed, he was asked to wait until he was called by Mr. R. P. S. Clay. At 3 p.m. Mr. Clay guided him to Mr. Stemson's office where in the presence of Mr. Bowkett, one of the directors of the defendant company, he was told that he was dismissed as from 3.30 p.m. because he had been guilty of misconduct in the past. His dismissal was a complete surprise to him.

In their amended statement of defence the defendants say that they dismissed the plaintiff summarily because he was guilty of misconduct in and about his employment. The acts of misconduct alleged are set out in the statement of defence as follows:—

"(a) Failing to maintain a proper record of telephone calls made on the account of Bertam estate as at 1/4/64.

(b) Attempting to persuade one Simon to destroy the record of telephone calls which he (Simon) maintained with effect from the 1st day of April 1964 as instructed by the manager of Bertam estate.

(c) Failing to draw the attention of the acting manager of Bertam estate to the fact that the shopkeeper on Bertam estate — Durian Tunggal Division — had failed to pay the shop rent for the months of June and July 1961.

(d) Directing the shopkeeper aforesaid to credit his personal account with the sum of \$150 which represented the shop rent for the months of June and July 1961, taking advantage of such credit and failing to reimburse the estate with that amount.

(e) Failing to draw the attention of the manager of Bertam estate to the fact that the shopkeeper aforesaid did not pay the rent for the month of October 1962.

(f) Directing the shopkeeper aforesaid to credit his personal account with the sum of \$50 which represented the shop rent for the month of October 1962, taking advantage of such credit and failing to reimburse the estate with that amount.

(g) Removing from Bertam estate and being in possession of a copy of a document intitled "Special Report by R.P.S. Clay" which is and was at all material times the property of the said estate."

The plaintiff has denied each of the alleged acts of misconduct as set out in the defendants' statement of defence. As to what he thinks was the real reason for his dismissal, he stated in the course of his evidence as follows:—

"In April 1964 I was afraid that I might be dismissed because I had helped the auditors, thereby alienating Mr. Bayne and Mr. Hughes. At first I carried out Mr. Hughes' instructions in going to the head office and refusing to answer the queries of the auditors. Then I was forced to disregard the instructions of Mr. Hughes and carry out the instructions of Mr. Austen. I had

A no reason to be apprehensive about my employment other than the possibility that the fact that I had answered Mr. Clay's questions might annoy Mr. Hughes and Mr. Bayne. I thought that because I had answered Mr. Clay's questions I might be victimised. I had no other reason for being apprehensive about my job. . . . I was afraid that I might be accused of having had a share of what Mr. Hughes was alleged to have misappropriated. . . . I thought that my transfer and subsequent dismissal, if I was in fact dismissed, would be over the 1963 accounts. At that time I did not dream that they would bring out the 1961 and 1962 accounts. . . . I think the real reason for my dismissal was that I assisted the auditor. I was victimised. Mr. Hughes is still in employment."

C To take allegation (g) in the statement of defence first, it is common ground that the special report by Mr. R. P. S. Clay was adverse to and critical of Mr. Hughes as manager of the estate. The plaintiff's answer to the allegation is that he took a copy of the report because he thought that in case he was victimised it might help him in establishing his innocence as there was no mention about him in the report. It has been contended on behalf of the defendants that there could be nothing more damaging than the publication of that report which was the property of the defendants and of which the plaintiff had taken a copy without their permission. It is said that the removal of the report in itself was sufficient to justify summary dismissal. To my mind there was nothing reprehensible about the plaintiff taking a copy of the report for himself. Obviously at least some part of the report must have been issued in consequence of the information which he gave to Mr. Clay. The report came to the estate while he was still chief clerk. I do not think it can be argued that as chief clerk of the estate he did anything wrong in reading the report. I do not think he did anything wrong in making a copy of it either, unless he did so with the intention of publishing it. There is no evidence that he published the report to anybody. There is also no evidence that he made use of it to the detriment of the defendants. In my opinion that disposes of allegation (g).

H I do not consider it necessary to go into the details of the evidence given by each party in relation to allegation (a) because it was conceded by Mr. Rintoul on behalf of the defendants that by itself the failure on the part of the plaintiff to maintain a record of telephone calls made would not be a ground for summary dismissal. Allegation (b), however, is a serious matter because any attempt by an employee to destroy his employers' property would be conduct of such a grave and weighty character as to undermine the relationship of confidence which should exist between master and servant (see *Sinclair v. Neighbour* ⁽¹⁾).

The plaintiff has denied that he ever telephoned to ask Mr. Simon to destroy the telephone book. As against his evidence there is the evidence of Mr. Simon and the evidence of Mr.

Sharkey that he did. The plaintiff says that Mr. Simon made this allegation against him because of some misunderstanding which they had had in the past. This is denied by Mr. Simon. I am satisfied that Mr. Simon was not making a false accusation against the plaintiff. He said in evidence that he had no intention of reporting the matter to the manager. It was the plaintiff's misfortune that at the time he made the telephone call the manager picked up his telephone receiver and overheard what he was saying to Mr. Simon. I have no reason to doubt the evidence of Mr. Sharkey either. It is clear that inquiries were then being made to ascertain what telephone calls recorded in the book were private calls made by the plaintiff. Correspondence had been going on between Mr. Sharkey and the plaintiff's then manager over this matter. It was therefore not surprising that in an attempt to put an end to this inquiry the plaintiff sought to have the telephone book destroyed. The book, however, was not destroyed. Mr. Simon had no intention of obliging the plaintiff, although at the same time he had no intention of reporting the matter to his manager. This conduct on the part of the plaintiff, to my mind, would have merited dismissal, but in all the circumstances summary dismissal would have been a drastic step. I would therefore hold that allegation (b) by itself would not be sufficient justification for summary dismissal as opposed to dismissal with reasonable notice.

That brings me to the other four allegations numbered as (c), (d), (e) and (f) in the statement of defence, all of which are so interconnected that they can be taken together or perhaps divided into two parts. The first part of the allegation is with regard to the alleged failure on the part of the plaintiff as chief clerk of Bertam estate to draw the attention of the acting manager and the manager respectively during the relevant period to the fact that the shopkeeper on Durian Tunggal division of the estate had failed to pay the shop rent for the months of June and July in 1961 and for the month of October in 1962. The plaintiff has maintained throughout that it was no part of his duty as chief clerk to keep the manager informed about the failure by the shopkeeper to pay the rent during any particular month. The acting manager and the manager during the relevant period, however, have maintained that it was the plaintiff's duty to do so. I do not propose to go into the details of the evidence when dealing with this allegation because in my opinion such failure by itself would not be a sufficient ground for summary dismissal. It is true that it is the duty of an employee to watch the interests of his employer, but if he omits to do anything through sheer forgetfulness and there is no dishonesty about it, dismissal with reasonable notice would be the appropriate remedy. The other reason for my saying so is that the shopkeeper

A paid his rent in arrears and was not regular in his payments.

In my judgment in the final analysis the answer to the question as to whether the defendants were justified in summarily dismissing the plaintiff depends on whether or not allegations (d) and (f) have been proved. The evidence produced by the defendants in support of these allegations is so strong that I have no hesitation whatever in saying that they have been proved beyond any reasonable doubt. In this connection the evidence of Mr. Sharkey (D.W.1) is that after he had assumed management of Bertam estate, on examining the books of the estate in order to familiarize himself with them, he discovered early in August 1964 that rent in respect of the shop on Durian Tunggal division of the estate for the months of June and July in 1961 and for the month of October, 1962 had not been paid. There were no entries in respect of such rents in the estate ledgers (D.11 and D.12) or in the manager's cash book and the main cash books (D.10, D.8 and D.9). The rent receipts for those months were also missing. He asked his chief clerk to make a check and the chief clerk confirmed that his findings were correct. On 12th August, 1964, he sent for the shopkeeper named Packir Mohamed (D.W.2). When questioned about the missing rent Packir Mohamed said that he had tendered the shop rent to the plaintiff but that on each occasion plaintiff had told him to credit it to his personal account with the shop. The shopkeeper then went back to his shop and brought back with him all his receipts (D.3 and D.4) and his shop book (D.5) which contained credit entries in respect of shop rents in the plaintiff's account with the shopkeeper. Mr. Sharkey went on to say that he referred the matter to the defendants and also sent to them the shopkeeper's account book and the receipts.

The evidence of Packir Mohamed (D.W.2) is that he used to go to the plaintiff's office and pay the rent to him there. He would receive a receipt for the rent if the manager was there, but if the manager was not there the plaintiff would collect the money and send the receipt to him later. The plaintiff used to buy goods from his shop and had an account with him which appeared at pages 94, 217 and 305 of his account book (D.5). At the end of 1961 there was a debit balance of \$358.35 in the plaintiff's account as shown on page 94 of D.5. The last item above the debit balance was a credit of \$150. He also made a credit entry of \$50 in the plaintiff's account in December, 1962 as shown on page 305 of D.5.

Packir Mohamed has explained how the credit entry of \$150 came to be made in the plaintiff's account. This is what he says:—

"I could not pay the shop rent. In fact I was in arrears for three months. The plaintiff called me up

and asked me about the arrears of rent. I told him that I would pay rent for one month and the balance later. This was in September, 1961. I had not paid the rent for June, July and August, 1961 when I saw the plaintiff in September. I paid one month's rent and came away. I did not get the receipt then. In October I went and said that I could pay only for one month and the balance later. The plaintiff agreed. I paid one month's rent. On a later occasion when I went to collect letters from the office the plaintiff told me that he would pay the estate rent for two months and asked me to credit his account with it. This happened some time in October, 1961. When I asked for the receipt I was given a receipt for one month. The receipt was in respect of rent for the month of October. The plaintiff asked me to credit his account with two months' rent. I did not credit his account then, because it was not in cash. I credited it in December, 1961. I have not paid the estate the amount which I credited to the plaintiff's account."

With regard to the credit entry of \$50 in the plaintiff's account at page 305 of D.5, Packir Mohamed's evidence is as follows:—

"I also credited the plaintiff's account in December 1962 with \$50 as shop rent. Instead of paying the rent to the estate I passed the credit to the plaintiff's account. I went and told the plaintiff in December 1962 that I was unable to pay the rent for November 1962 and requested him to pay the rent to the estate and that I would credit his account with that amount. He agreed and I credited his account with it at the end of December, 1962. If the plaintiff says that he had never seen D.5 until this case started, that would not be correct. There is an entry in D.5 in his own handwriting. At page 217 the entry dated 25th February, 1962 which reads 'By balance \$348.50' and the words below 'less cash \$200' are in his handwriting."

Mr. de Courcy Williams (D.W.7) has given evidence to say that when he went to the estate the rent for the shop on Durian Tunggal division was \$75 a month. He reduced it to \$50 a month as from 1st January, 1962 after he had been confirmed as manager of the estate. It was never easy to collect the rent from the shopkeeper and for that reason it was usually outstanding for quite a while. He would ask his chief clerk, the plaintiff, to call the shopkeeper and get the rent from him. He did not usually call the shopkeeper to pay him. The usual procedure was for the plaintiff to collect the rent from the shopkeeper and bring it to him in his office together with a receipt made out for his signature. He would then enter up the amount of the rent in the manager's cash book. The evidence of Mr. Richert (D.W.6) as to how the shop rent was collected is more or less to the same effect. Mr. Sharkey (D.W.1) has testified that during the period that he has been manager of Bertam estate the rent from the shop in Durian Tunggal division is brought to him by the chief clerk together with a receipt dated and completed for his signature. He does not know whether it was the same procedure adopted by the previous manager, but it is a procedure that is followed on all estates and it is a procedure which he has followed wherever he has been.

The evidence of the plaintiff in relation to these allegations is that the shopkeeper paid the rent direct to the assistant manager or the

A manager, that the manager shouted out to him from the office the amount of the rent and the month for which it was paid and called out for a receipt, that he prepared the receipt and took it inside the manager's office for the manager to sign and that the manager himself made an entry in his cash book which he kept in his safe. I cannot accept that evidence. I cannot accept his explanation as to the reason why Packir Mohamed gave evidence against him. Packir Mohamed has said in evidence that he has no grudge against the plaintiff and that in fact they were very friendly. The plaintiff has said that Mr. Richert never liked him and that he came to the estate with preconceived ideas. Nothing is said as to what preconceived ideas Mr. Richert had, but he was certainly not very long on the estate, and the evidence which he has given is supported by the account book. Whatever the plaintiff may have said of other witnesses it cannot be said of Mr. de Courcy Williams that he was at any time hostile to him. The plaintiff has in fact said that there was no bad blood between him and Mr. de Courcy Williams who had given him a testimonial. I have therefore no hesitation whatsoever in accepting the whole of the evidence of Mr. de Courcy Williams as being the truth and nothing but the truth.

Evidence has been given by Mr. Foo Yee Yuen (D.W.3) that as an accountant employed by the defendants in 1962 he did an audit of the accounts of Bertam estate for the year 1962. As he had one or two days in which to complete the audit on the estate he did only a spot check of the shop rent in respect of April and July. As his main job was to check the crop and the actual expenditure incurred by the estate and the shop rents were nominal, he overlooked the shortage in respect of shop rents. The defendants employed one Paul Jeffry Barnard (D.W.4) to audit the accounts of the estate for 1961 and 1962. His evidence is that he examined the accounts in respect of shop rents received from the Durian Tunggal division shop and his examination revealed that rents for the months of June and July, 1962 and either for the month of October or for the month of November in 1962 had not been received.

Quite apart from the evidence given by the witnesses, it seems abundantly clear from an examination of all the account books produced at the trial that the estate had not received the rent for the shop on Durian Tunggal division for the months of June and July, 1961 and for the month of October or November in 1962. It has been suggested that the account book of the shopkeeper was not properly kept. I do not agree. Having carefully examined the book myself, I must say that it certainly does not look to me as if the account book has been specially written up for the purpose of this case. The

entry at page 217 of this book by the plaintiff in his own handwriting comes after the credit entry of \$150 in respect of shop rent. There is no evidence that the plaintiff queried that entry at any time. I would therefore repeat that the defendants have proved allegations (d) and (f) beyond any reasonable doubt.

Having found as a fact that the plaintiff directed the shopkeeper to credit his personal account with shop rents, that he took advantage of such credit and that he failed to reimburse the estate with the amount of the shop rents, I must hold that the defendants were justified in summarily dismissing him. Misconduct inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal. If he is guilty of fraud or dishonesty in connection with the business of his employer, he may be dismissed (see *Halsbury*, 3rd edition, volume 25, page 485, paragraph 934).

Because of his summary dismissal the plaintiff is not entitled to any damages for wrongful dismissal. He made a general claim for damages, but by reason of the decision in *Hayward & Anor. v. Pullinger & Partners, Ltd.*⁽²⁾ the statement of claim was amended so as to claim three months' loss of wages as special damages by way of damages for wrongful dismissal. This claim, however, as I have said, must fail.

The plaintiff is also not entitled to his salary for the period 1st August to 27th August, 1964 on the ground that his salary was paid monthly and it was not due and payable on the date of his dismissal. In this connection I would refer to the following passage in *Smith's Law of Master and Servant*, 7th edition, at page 132:—

"When a servant, whose wages are due periodically, refuses to perform his part of the contract, and serve his master in the manner contracted for or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last periodical payment of wages. That is to say, if a servant whose wages are only due yearly abscond from his master, or is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such departure or discharge. And the same principle would apply to the case of a quarterly, monthly or weekly hiring. In any of such cases, if the servant fails to perform his part of the contract, or be rightfully discharged at any intervening period between the days when his wages are due, he can recover nothing for the broken period of service. This is upon the principle that the contract was an entire contract, and the performance of the service for the whole time agreed upon was in the nature of a condition precedent to the right to recover any wages."

The plaintiff, however, is entitled to accrued leave pay for six weeks at \$560 per month for the period 1st July, 1962 to 30th June, 1964 together with a provident fund of 15% thereon

as claimed. He is also entitled to his transport expenses from Labis to Kuala Lumpur and back as claimed. There will thus be judgment for the plaintiff for \$1,059.75 with costs on the sessions court scale.

Order accordingly.

Solicitors: P. G. Lim; Shearn, Delamore & Co.

LING NAM RUBBER WORKS v. LEONG BEE & CO.

[F.C. (Ong Hock Thye F.J., Raja Azlan Shah & Pawan Ahmad JJ.) January 26, 1968]

[K.L.—Federal Court Civil Appeal No. X. 76 of 1966]

Negligence — Fire in a factory spreading to the neighbouring premises causing extensive damage — Damage unforeseeable — Criterion of liability.

Nuisance — Negligence — Damage unforeseeable in nuisance is necessarily unforeseeable in negligence.

Master and servant — When master vicariously liable.

About 5 a.m. on February 2, 1964 a fire broke out in a factory manufacturing rubber slippers and spread to the neighbouring premises causing extensive damage. The workmen in the factory had departed and all machinery had stopped at the end of the previous working day. A night watchman installed in the factory was asleep until awakened by warning shouts of "Fire" from outside. The cause of the fire was never established.

In an action claiming damages on the grounds of nuisance, negligence and the rule in *Rylands v. Fletcher*,⁽¹⁾ Azmi C.J. (Malaya) dismissed the claim in nuisance but held the defendants liable in negligence. The rule in *Rylands v. Fletcher* was not considered. The defendants appealed against the verdict in negligence and the plaintiffs cross-appealed in respect of nuisance and the quantum of damages.

Held: foreseeability being a common factor in nuisance and negligence, damage unforeseeable in nuisance is necessarily unforeseeable in negligence. On the facts, neither the watchman nor his employers could have reasonably foreseen the outbreak of fire in a deserted idle factory, even as a remote possibility.

Semle (per Ong Hock Thye F.J.): "Where the fault of master or servant, individually, does not amount to negligence in law on the part of either, the joint and cumulative fault of both cannot render the master vicariously liable."

Appeal allowed, and cross-appeal dismissed, with costs.

Cases referred to:—

- (1) *Rylands v. Fletcher* (1886) L.R. 1 Ex. 265.
- (2) *The Wagon Mound* (No. 2) [1966] 2 All E.R. 710.
- (3) *Goldman v. Hargrave* [1966] 2 All E.R. 989, 992.
- (4) *The Wagon Mound* (No. 1) [1961] 1 All E.R. 404, 415.
- (5) *Bolton v. Stone* [1951] A.C. 850.

FEDERAL COURT.

Peter Mooney for the appellant.

C. S. Wu for the respondent.